OOI BEE TAT DEVELOPMENT SDN. BHD.

v.

OOI BEE TAT

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING MOTION NO. 29 OF 1983]
2 APRIL 1985

LAND LAW: *Caveats - Application to remove - Whether there was a serious question to be tried - Whether a resulting trust existed - Whether special circumstances existed to warrant removal - Caveatable interest - Illegality of contracts - Ex parte order extending caveat - Effect.*

CIVIL PROCEDURE: *Ex parte application - No material fact - Effect.*

The application under s. 327 of the National Land Code was by a family company ('the company'), the registered proprietor of certain disputed properties, for the removal of the caveats entered against them by the respondent. The respondent contended that the disputed properties had been held on trust for him and that subsequently the company, in breach of trust, had sold off the disputed properties. The company, on the other hand, claimed that the disputed properties had been first purchased by the company itself for a consideration of RM150,000, and that the company had subsequently allotted 150,000 shares fully paid up to the respondent's wife and two sons.

Held:

[1] The respondent's claim to a resulting trust was so inconsistent, not only with the contemporary documents, but with the concession previously made by the respondent's own Counsel, that there was insufficient *prima facie* plausibility to merit further investigation.

[2] The respondent had no caveatable interest even if his claims for an implied trust were well-founded. The ownership in the disputed properties had passed to the purchasers who had entered caveats against the disputed properties before the respondent had entered his caveat. The company held the disputed properties as bare trustees for the purchasers.

[3] The sale contracts were not illegal. For a contract to be illegal as being made in contravention of some provision, there has to be a sufficient nexus between the statutory requirement and the contract. The test as to the enforceability of a contract is whether on a true construction of the relevant statute as a whole, Parliament had intended to prevent plaintiff from enforcing the contract. The submission on s. 35(3) of the Companies Act 1965 was therefore without substance and untenable. (*Curragh Investments Ltd. v. Cook* [1974] 1 WLR 1559).

[4] The *ex parte* order extending the respondent's caveat until further order was void and of no effect. The order plainly contravened s. 328(1) of the National Land Code as otherwise the caveat could extend beyond the period of six years provided by that subsection. Further the respondent had been guilty of a deliberate misrepresentation of a material fact when he stated falsely in his affidavit that the shares were not fully paid up. When a party applies *ex parte*, full disclosure of all material facts must be made and the doctrine of *uberrima fides* applies by analogy. When material facts are withheld, the *ex parte* order may be set aside irrespective of the merits and the question of balance of convenience does not arise.

(*Beese & Ors. v. Woodhouse & Ors.* [1970] 1 WLR 586; *Castelli v. Cook* [1849] 7 Hare 89 Eng. Rpts. Vol. 68 p.36; *Dalglish v. Jarvie* [1850] 2 Mac. & G 231 (*Macnaghten & Gordon's Reports* Vol. 2); *M.R.K. Nayar v. Ponnusamy & Ors.* [1982] 2 MLJ 174).

[Application allowed.]

Cases referred to:

Eng Mee Yong & Ors. v. V.Letchumanan [1979] 2 MLJ 212
Teo Ai Choo v. Leong Sze Hian [1982] 2 MLJ 12
Curragh Investments Ltd. v. Cook [1974] 1 WLR 1559
London & Harrogate Securities Ltd. v. Pitts [1976] 1 WLR 1063
Batu Pahat Bank Ltd. v. The Official Assignee of the Property of Tan Keng Tin, a Bankrupt [1933] MLJ 237
Beese & Ors. v. Woodhouse & Ors. [1970] 1 WLR 586
Castelli v. Cook [1849] 7 Hare 89 Eng Rpts Vol 68
Dalglish v. Jarvie [1850] 2 Mac & G 231
The King v. The General Commissioners for the Purposes of the Income Tax Act for the District of Kensington [1917] 1 KB 486
M.R.K. Nayar v. Ponnusamy & Ors. [1982] 2 MLJ 174
Ooi Bee Tat v. Ooi Bee Tat Development Sdn Bhd & Ors [1984] 2 CLJ (Rep) 299

Legislation referred to:

National Land Code 1965, ss. 327, 344(1), (2), 328(1)
Companies Act 1965, ss. 35(3), 131(5)
Companies Ordinance (No. 155) [Straits Settlemants], s. 111(3)

For the plaintiff/applicant - N.G. Sivananadan; M/s Presgrave & Matthews
For the defendant/respondent - Ranjit Rai Sharma; M/s Sharma & Jaafar

JUDGMENT

Edgar Joseph Jr J:

At the conclusion of the arguments yesterday I indicated that I would give my judgment today. I now proceed to do so.

This is yet another round in the legal battle involving members of a family who have fallen out which I had occasion to refer to in my judgment reported in the Current Law Journal [1984] 2 CLJ 119; [1984] 2 CLJ (Rep) 299 in these terms:

> 1. This is a tale members of a family who have fallen out. They belong to two opposing camps; the husband in one and the wife and three sons in the other. Their quarrel is about ownership of certain land on which stated six dwelling houses, namely, Nos. 17/27, Katz Street, Penang (the disputed properties), and each camp is accusing the other of lying. Charges of fraud are also in the air. Their quarrel has now reached this Court in the shape of an application by Originating Notice of Motion by the father supported by affidavit praying for various order to which I shall presently refer.
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> 2. His story in a nutshell is that early in 1977 he purchased the disputed properties for RM150,000 but caused the transfer to be registered in the name of Ooi Bee Tat Development Sdn. Berhad (the First Respondent) a family company of which one of his sons and he were the original subscribers, Later that year, the First Respondent Company allotted 70,000 shares to his wife and 40,000 to each of his two sons, amounting in all to 150,000 shares.

3. He then claims that he lost control of the First Respondent Company and that although the relevant return in Form 49 showed that he had 'retired' as a Director on 14 May 1981, this was not in fact so inasmuch as "this 'retirement' was done in my absence and without my consent." That fraud or dishonesty of some sort was implied in this allegation is clear beyond preadventure.

4. He then makes the further claim that subsequently, in breach of trust. The First Respondent Company entered into a number of sale and purchase agreements whereby it sold the disputed properties to the second, third, fourth and fifth Respondents, each of whom have lodged private caveats to protect their respective interests thereunder.

5. He then consulted his solicitors to recover the disputed properties and, as a preliminary step, sought removal of the caveats but to no avail. Hence, these proceedings.

6. He prays for a declaration that the First Respondent Company holds the disputed properties in trust for him, for vesting orders in his favour and for expungement from the records of the Commissioner of Land Titles, Penang, of all entries relating to the caveats aforesaid.

7. The case for the opposing camp is set out in the affidavit of Ooi Kim Keat, Managing Director of the First Respondent Company, affirmed to on 13 January 1984 (Encl. 16).

8. He asserts that within less than three months after its incorporation, the directors of the First Respondent Company (including the Applicant) resolved that the First Respondent Company would purchase the disputed properties for RM150,000. In support, he exhibited the relevant minutes of the Director's Meeting, being Exh: OKK 1.

9. Next, he asserts that pursuant to that resolution on 9 August 1977, the disputed properties were transferred to the First Respondent Company for a consideration of RM150,000, paid no doubt by the Applicant but, in advancement of the shares issued by the First Respondent Company to the Applicant's wife (Ong Heok) and his two sons, Ooi Kim Seong and Ooi Kim Hoo, to which I have already adverted. In support, he exhibited the relevant Circular Director's Resolution dated 10 September 1977 (Exh. OKK3) and a copy of an extract from the Journal of the First Respondent Company certified by its auditors, showing that the Applicant had paid the RM150,000 to the First Respondent Company in respect of the abovementioned allotment of shares.

10. He accordingly asserts that the Applicant paid the sum of RM150,000 by way of a gift having regard to the relationship of the parties concerned and that 'the element of trust does not arise.'

The application now before me, being Encl. 8, under s. 327 of the National Land Code, is by the Family Company aforesaid ("the Company"), the registered proprietor of the disputed properties, for removal of the caveats entered against them on 4 April 1983 by the father, the respondent herein.

Before proceeding further, it is material to mention that after lodging his caveat the respondent applied *ex parte* on affidavit (Encl. 2) and obtained an order from Mustapha J on 18 August 1983 (Encl. 4) that his caveat be extended "until further order" but with liberty to the caveatee to apply.

In that affidavit the respondent did refer to the allotment of the 150,000 shares in the Company in favour of his wife and two sons, to which I made reference in the passages in my judgment reproduced above. Specifically, what he said was this: "The Company subsequently allotted 150,000 shares to Ong Heok @ Ong Siew Kam (70,000 shares), Ooi Kim Seong (40,000 shares) and Ooi Kim Hoo (40,000 shares). **I believe that these shares have not been paid up**" (Emphasis supplied). The importance of this will become apparent later.

As to the rival versions of the facts material to this application, these appear sufficiently from the passages in my judgment reproduced above. What now remains to be done is for me to determine whether, on these facts, the respondent as caveator has discharged the onus of showing that there is a serious question to be tried and, if so, whether the Company, as caveatee, has demonstrated that there are special circumstances which show, that on the balance of convenience, the caveat ought to be removed (per Lord Diplock in *Eng Mee Yong & Ors. v. V.Letchumanan* [1979] 2 MLJ 212).

Clearly, the only objective evidence relied on by the respondent to prove his assertion of a resulting trust is the undisputed fact that he did provide the purchase price for the disputed properties when he drew three cheques being, Exhibits "A", "B" and "C", annexed to Encl. 2, for RM15,000, RM50,000 and RM85,000 respectively, in favour of Messrs. Lim, Lim & Onn, Solicitors for the Company.

In these circumstances, Mr. Sharma for the respondent submits that since his client did admittedly provide the purchase price for the disputed properties the presumption arises that they are held by the Company on a resulting trust for his client. On the other hand, Mr. Sivanandan for the Company, referred to the affidavits of Ooi Kim Keat, the Managing Director of the Company and a son of the respondent, affirmed to on 24 November 1983, being Encl. 9, on 14 March 1985 being Encl. 24, and on 1 April 1985 being Encl. 25, wherein he states, in effect, that the consideration for the purchase price of RM150,000 was the allotment on 10 September 1977 of 150,000 fully paid up shares of RM1 each to the respondent's wife and two sons intended by way of advancement. In support, he exhibited certain contemporary documents, namely:

(a) A copy of the minutes of a Directors' Meeting held on 7 September 1977 being, Exhibit "OKK1", annexed to Encl. 9, resolving, *inter alia*, that the Company do purchase the disputed properties. The Respondent, in his capacity as Chairman and Director, was a party to this resolution.

(b) A copy of the Circular Directors' Resolution dated 10 February 1977 being, Exhibit "OKK3", annexed to Encl. 9, resolving "that 150,000 ordinary shares, of RM1 each, fully paid, in the share capital of the Company (**the application and allotment monies having been received**)" be allotted as aforesaid. Again, the Respondent was a party to this resolution. (Emphasis supplied).

(c) Photostatic copies of extracts from entries in the Company's Journal and Cash Book being, Exhibit "OKK4", annexed to Encl. 9, duly audited by the Company's auditors showing that on 10 September 1977 the Respondent had paid RM150,000 to the Company in respect of the above-mentioned allotment of shares to his wife and two sons.

(d) The Company's Share Certificates bearing Nos. 3, 4 and 5 marked being, Exhibit 'OKK4', annexed to Encl. 9.

In answer to the Court, Mr. Sharma confirmed, after consulting his client in Court, that the Company has, at all material times, enjoyed the rents accruing from the dwelling houses standing on the disputed properties, has paid all dues and duties, payable in respect of the same and retained custody of the relevant title deeds.

According to his affidavit, affirmed to on 8 August 1983 (Encl. 2) filed in support of his Originating Notice of Motion, the respondent says he lost control of the Company on or about 14 May 1981. Yet, it was not until 9 August 1983, that he commenced proceedings.

Again, what were the reasons for the inaction and delay on the part of the respondent in lodging his caveat, five years after the transfer to the Company and one year after the sub-sales? No reasons were vouchsafed to this Court for these, although there is authority for saying that such unexplained delay can, by itself, result in the caveat being withdrawn: *Teo Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 12. Nor, for that matter, did the respondent take advantage of the provisions of s. 344(1) and (2) of the National Land Code to have the Company registered by way of memorial on the register document of title "as trustee". Neither did he declare his alleged beneficial interest at a Directors' meeting held on 14 April 1981 when it was resolved by the Company to make the purchase although he was under a statutory obligation to do so under s. 131(5) of the Companies Act, 1965.

There is a further criticism which can be made of the respondent's case and it is this: in the previous proceedings, Mr. Sharma had conceded that the respondent had intended a gift to his wife and two sons but the subject matter remained uncertain. He asked rhetorically, "was it a gift of shares or an assignment of a debt or the disputed properties?"

I remarked when giving my judgment in the previous proceeding (see [1984] 2 CLJ (Rep) 299 at 301 and I would repeat now, "... if so, then the Applicant was certainly changing his tune."

Clearly, therefore, the respondent's claim to a resulting trust is not only inconsistent with the contemporary documents, to which I have referred, but inconsistent with the concession made by his own Counsel in the previous proceedings, so much so, that I do not consider that his claim to a resulting trust has sufficient *prima facie* plausibility to merit further investigation.

Alternatively, if contrary to my primary opinion, the affidavits before me do disclose a serious question to be tried, then I have to go on to consider whether the Company has shown there are special circumstances which, having regard to the balance of convenience, justify the removal of the caveat.

It was alleged by Ooi Kim Keat in his affidavit, being Encl. 9, filed in support of this application, and not challenged by the respondent, that the Company had entered into four separate sale and purchase agreements dated 3 April 1982, 5 May 1982, 16 December 1982 and 30 December 1982 for the sale of the disputed properties to certain individuals and an incorporated company, who are *bona fide* purchasers for value without notice. These purchasers have paid the entire purchase price and have been given possession.

Other particulars regarding these sub-sales may be stated shortly.

As regards 21, Katz Street, which stands on part of Lot 321, one of the disputed properties, the purchaser thereof had on 20 December 1982, caused to be registered, a caveat against it, being Exhibit "YKB3" annexed to Encl. 2 in Originating Motion No. 42/84 - that is to say, about 3½ months before the respondent lodged his.

Similarly, as regards 37, Katz Street, which stands as Lot 315, the purchaser had on 5 February 1983 caused to be registered a caveat being Exhibit "CSS3" annexed to Encl. 2 in Originating Motion No. 12/84 - that is to say, about two months before the respondent lodged his. Subsequently, on 29 June 1983, a transfer in due form, being Exhibit "CSS5", annexed to the same enclosure, was duly executed and presented for registration but was rejected by the Land Office by reason of the existence of the respondent's caveat.

In these circumstances, it appears to me that a powerful argument could be mounted as the final hearing of the substantive proceedings for a declaration as to ownership of the disputed properties, that even if the respondent's claim of an implied trust are well-founded, ownership in the disputed properties had passed to the purchasers so that the Company holds the same as bare trustees for them with the consequent result that the respondent has no caveatable interest therein.

This brings me to a consideration of another point raised by Mr. Sharma which concerns s. 35(3) of the Companies Act, 1965, which reads:

> Where any contract is entered into by or on behalf of a company which involves the sale of all or substantially all of the undertaking or assets of the company and the contract is not expressed to be made subject to a condition that it is subject to ratification by a resolution of the company passed at a general meeting of the company the company and every officer who is in default shall be guilty of an offence against this Act.
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> Penalty: Imprisonment for six months or two thousand dollars.

It was submitted that since the intended sales were of the whole of the assets by the Company and none of the agreements concerned recited the fact that the intended sale was subject to the approval of Company in general meeting there had been a breach of that section thus invalidating the same.

At first sight, there seemed much to be said for Counsel's argument. But, reflection and my own researches reveal that it is neither consistent with the plain words of the Act nor necessary to enable justice to be done.

In *Curragh Investments Ltd. v. Cook* [1974] 1 WLR 1559, Megarry J (as he then was) held that for a contract to be illegal as being made in contravention of some statutory provision there had to be a sufficient nexus between the statutory requirement and the contract and that where statutory requirements were not linked sufficiently or at all, to the contract, no question of illegality arose. The following passage in his judgment is especially relevant and merits reproduction in full:

> If the statute prohibits the making of contracts of the type in question, or provides that one of the parties must satisfy certain requirements (e.g. by obtaining a licence or registering some particulars) before making any contract of the type in question, then the statutory prohibition or requirement may well be sufficiently linked to the contract for questions to arise of the illegality of any contract made in breach of the statutory requirement. But it seems to me a far cry from that to the breach of statutory requirements which are not linked sufficiently or at all to the contract in question. There are today countless statutory requirements of one kind or another, yet I cannot believe that an individual or a company who is in breach of any of these requirements (for example, under the Factories Act) is thereby disabled from making a legal contract for the sale of land or validly entering into covenants for title. To take an example that was mentioned in argument, I do not think that it could seriously be contended that every contract made by an English company, whether for the sale of land or otherwise, is illegal if, when it is made, the company is liable to prosecution and fine for failing to comply with some provision of the Act of 1948, for example, for not filing its annual returns in due time. Such a doctrine, for which I can see no justification, would result in chaos. If in the present case I assume that the vendor is in demonstrable breach of ss. 407 and 416, I am still quite unable to see how this provides any ground for contending that the covenants for title that the vendor must give will be impaired by illegality. The breach of the law and the covenants for title seem to me to be wholly unconnected.

In *London & Harrogate Securities Ltd. v. Pitts* [1976] 1 WLR 1063 CA, the Court of Appeal in England held that a contravention of the English Moneylenders Act, 1927, was concerned only with criminal liability and did not provide a defence in a civil action for repayment of loan made by licenced moneylenders.

In *Batu Pahat Bank Ltd. v. The Official Assignee of the Property of Tan Keng Tin, a Bankrupt* [1933] MLJ 237, the Judicial Committee of the Privy Council held that a contravention of s. 111(3) of the Companies Ordinance No. 155, which provided no banking company shall lend any part of its funds on the security of its own shares did not invalidate the security given, namely, a lien on the fully paid up shares, which, apart from the subsection would be an effective lien.

The test to be distilled from the authorities just cited as to the enforceability of a contract is whether on a true construction of the relevant statute as a whole Parliament had intended to prevent the plaintiff from enforcing the contract; applying this test, I am satisfied that the argument based on s. 35(3) of the Companies Act, 1965, put forward by Mr. Sharma, is without substance and therefore quite untenable.

On two further grounds also, the caveat should be set aside.

I had also mentioned earlier on in this judgment that the respondent had obtained an *ex parte* order from Mustapha J on 18 August 1983 which provided for the extension of the respondent's caveat until further order.

It was submitted by Mr. Sivanandan that this order contravened s. 328(1) of the National Land Code which provides as follows:

> A private caveat shall, if not sooner withdrawn under s. 325 or removed by the Registrar pursuant to s. 326 or an order of the Court under s. 327, lapse at the expiry of six years from the time from which it took effect, and the entry thereof may be cancelled accordingly by the Registrar, either of his own motion or on an application in that behalf by any interested person or body.

On a strict wording of the *ex parte* Order the life of the caveat could conceivably be extended beyond its maximum statutory duration of six years since it is not uncommon for suits to be pending trial in the High Court for more than six years. With respect, in my opinion, it therefore plainly contravenes s. 328(1) of the National Land Code, 1965 and is therefore void and of no effect. It would have been otherwise if the order had been expressed in the following words or words to the like effect: "that the caveat be and is hereby extended pending further order provided always that in no circumstances shall it endure for a period exceeding six years from date it took effect regard being had to the provisions of s. 328(1) of the National Land Code, p. 965".

In the second place, in his affidavit filed in support of the application for extension of his caveat (Encl. 2), the respondent had, as I have already said, categorically stated that the 150,000 shares in the family company which had been allotted to his wife and two sons were, he believed, not fully paid up. This was patently false and untrue to his own knowledge since he had acknowledged the contrary in the Directors' Resolution dated 14 April 1981, the Circular Directors' Resolution dated 10 September 1977 and the relevant Share Certificates aforesaid.

Clearly, there was here a deliberate misrepresentation of a material fact when he said he believed that the shares concerned were not fully paid up.

a It is settled law that when a party applies *ex parte*, full disclosure of all material facts must be made and that the doctrine of *uberrima fides* applies by analogy: per Davies LJ in *Beese & Ors. v. Woodhouse & Ors.* [1970] 1 WLR 586. For this reason, where material facts have been withheld, the *ex parte* Order may be set aside irrespective of the merits: *Castelli v. Cook* [1849] 7 Hare 89 Eng. Rpts. Vol. 68 p.36 and *Dalglish v. Jarvie* [1850] 2 Mac. & G 231 (*Macnaghten & Gordon's Reports* Vol. 2). The fact b that the party in whose favour the *ex parte* order was made may think the facts misstated or concealed not material or may have forgotten them affords no excuse: *The King v. The General Commissioners for the Purposes of the Income Tax Act for the District of Kensington* [1917] 1 KB 486. Furthermore, where there has been suppression of facts, the question of balance of convenience does not arise: *M.R.K. Nayar v. Ponnusamy & Ors.* [1982] 2 MLJ 174.

c In the result, I allow the application for removal of the respondent's caveat with costs to the applicant.

I am now prepared to hear arguments as to any consequential orders I should make.

Also found at [1985] 1 CLJ 449

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